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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGANS FOR OPEN GOVERNMENT, Plaintiff and Respondent, v. CITY OF SAN DIEGO AND SAN DIEGO TOURISM MARKETING DISTRICT CORPORATION, Defendants and Appellants.	D072181 (Super. Ct. No. 37-2012-00088065-CU-MC-CTL)

APPEAL from orders of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Reversed in part, affirmed in part, and remanded with directions.

Colantuono, Highsmith & Whatley, Michael G. Colantuono and Ryan Thomas Dunn for Defendant and Appellant San Diego Tourism Marketing District Corporation.

Mara W. Elliot, City Attorney, Lynn M. Beekman, Deputy City Attorney, for Defendant and Appellant City of San Diego.

Briggs Law Corporation, Cory J. Briggs, Anthony N. Kim; Higgs, Fletcher & Mack, John Morris and Rachel E. Moffitt for Plaintiff and Respondent.

After the City of San Diego (City) renewed its Tourism Marketing District assessment in 2012, San Diegans for Open Government (SDOG) sued the City and the San Diego Tourism Marketing District Corporation (TMD) claiming the assessment was an illegal tax under the California Constitution. After five years of litigation and the amendment of the assessment by the City, the lawsuit was dismissed by SDOG and judgment was entered for the City and TMD. Despite the adverse judgment, SDOG persuaded the trial court to grant its motion for attorney's fees under Code of Civil Procedure section 1021.5.[1] The City and TMD challenge the award of attorney's fees. Because SDOG did not obtain the primary relief it sought in this case, we hold the court's award of attorney's fees was an abuse of discretion and reverse the order on this basis. TMD also challenges the trial court's orders striking its costs and denying its motion to disqualify SDOG's counsel. We agree the court abused its discretion by striking TMD's costs and decline to reach TMD's challenge to the court's denial of its motion for disqualification in light of our reversal of the trial court's orders awarding fees and striking costs.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007, the City adopted the San Diego Tourism Marketing District Procedural Ordinance, San Diego Municipal Code section 61.2501 et seq., that established a tourism

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1 Subsequent undesignated statutory references are to the Code of Civil Procedure.

marketing district to assess lodging businesses in San Diego and to fund collective marketing efforts on behalf of those businesses. The ordinance also authorized the City to contract with a nonprofit organization to administer the assessment and implement a marketing plan. The ordinance created a five-year term for the assessment, with the option to renew if a majority of businesses that would pay more than half of the assessments proposed to be levied petitioned for renewal.

That majority did petition for renewal, and on November 26, 2012, the City adopted a resolution renewing the assessment for 39½ years and approving a new district management plan to govern the levy, collection, and expenditure of the assessments. Under the district management plan adopted by the resolution, hotels with 30 or more rooms paid assessments equal to 2 percent of room rents, while smaller hotels and vacation rentals were subject to a 0.55 percent assessment.

On September 24, 2012, the day before a city council meeting that included the consideration of the assessment renewal ordinance on its agenda, SDOG's attorney, Cory Briggs, e-mailed the city council and urged its members to vote against the proposal. Briggs argued the "funding mechanism for the proposed Tourism Marketing District ('TMD') is unconstitutional under Proposition 26 (enacted November 2010)." In addition, Briggs attached a memorandum prepared by the city attorney a few months earlier addressing Proposition 26 and business based assessments, which Briggs asserted showed the TMD was an illegal financing scheme.

Brigg's e-mail ended by stating that if the city council approved "the TMD and its associated assessment on hotels, you will be inviting lawsuits and a substantial bill for

legal fees—not only from the attorneys you hire to defend the (indefensible) TMD but from the attorneys who represent the registered city voters who are being denied the opportunity to vote on the TMD." A representative of SDOG, Ian Trowbridge, and Briggs appeared at the September 25, 2012 city council meeting. Briggs urged the council to obtain further legal guidance from the city attorney before adopting the proposed ordinance and repeated his warning that the ordinance was a violation of Proposition 26 because the marketing benefits of the TMD were not limited to the lodging businesses assessed.

After the resolutions renewing the assessment ordinance were passed, SDOG filed suit against the City alleging the ordinance violated Proposition 26 because it was a tax passed without a vote of the electorate of the City.[2] The City and TMD demurred on the ground that SDOG lacked standing to bring suit because it was not subject to the assessment. SDOG filed an amended complaint alleging it had standing as a taxpayer

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2 State voters passed Proposition 26 in 2010. The "measure amended the Constitution to provide that for purposes of article XIII C, which addresses voter approval of local taxes, ' "tax" means any levy, charge, or exaction of any kind imposed by a local government' (Cal. Const., art. XIII C, § 1, subd. (e)), except (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost, (2) a charge for a specific government service or product provided directly to the payor and not provided to those not charged, which does not exceed its reasonable cost, (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders, (4) charges for access to or use, purchase, rental, or lease of local government property, (5) fines for violations of law, (6) charges imposed as a condition of developing property, and (7) property-related assessments and fees as allowed under article XIII D. The local government bears the burden of establishing the exceptions. (Cal. Const., art. XIII C, § 1, subd. (e).)" (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 260.) Whether the TMD assessment violated or violates Proposition 26 is not before this court, and we express no opinion on the issue.

and voter organization. The parties then stipulated to a second amended complaint, which included additional standing allegations based on SDOG's membership including voters, hotel customers, and hotel operators eligible to vote on the assessment. The City and TMD demurred, again asserting that SDOG lacked standing to challenge the assessment. The trial court sustained the demurrer with leave to amend, stating that SDOG "does not appear to pay the assessment/tax it challenges."

SDOG filed its third amended complaint (TAC) (the final operative complaint in the litigation) and the City and TMD again demurred on the basis of standing. This time, the trial court overruled the demurrer, concluding that SDOG had sufficiently alleged standing because the TAC stated at least one member of SDOG was eligible to vote on the assessment and either was not given the chance to vote or voted against it.[3] In rejecting the defendants' argument that the TAC's standing allegations were too vague, conclusory and overly cryptic, the trial court also stated that "discovery is the proper mechanism to expand on [the] allegations."

Thereafter, the parties engaged in an extended period of discovery, including motions to compel and motions for protective orders, concerning SDOG's standing. Even after it obtained a protective order allowing it to keep the identity of its members from the public, SDOG continuously refused to provide the City and TMD with the identity of the members on which its standing was based. Eventually, after TMD moved for terminating and other sanctions based on SDOG's refusal to provide the identity of its members,

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3 The City and TMD filed a petition for writ of mandamus challenging the order, which this court summarily denied.

SDOG named several members, including two it asserted were hotel operators required to pay the assessment, Linda Perine and Sarichia Cacciatore.

Perine and Cacciatore were eventually deposed. Cacciatore's deposition testimony revealed that she was not a member of SDOG and had never used the property that SDOG asserted was the basis of its associational standing for transient housing. Perine's deposition testimony also suggested her standing was manufactured, for example she claimed no recollection of completing SDOG's membership form. TMD sought to discover additional information about Perine's standing but was blocked by SDOG's asserted attorney-client privilege and the privacy rights of the individuals with allegedly relevant information.

In the summer of 2015, the City and TMD moved for summary judgment, again asserting SDOG lacked standing to challenge the 2012 city council resolutions that amended and renewed the assessment municipal code provisions. The motion for summary judgment also asserted the lawsuit was ultra vires, SDOG was an alter ego of Brigg's law corporation, and SDOG had not maintained its corporate status during the litigation. In the alternative, the City and TMD sought summary adjudication of SDOG's second and third causes of action, and several of TMD's affirmative defenses. Before the court decided the motion, SDOG dismissed the third cause of action, which challenged TMD's expenditure of assessments prior to the 2012 amendment on the basis that it improperly benefited small hotels at the expense of the large hotels, which paid higher assessments.

The court denied summary judgment on the basis of standing, concluding Perine's deposition testimony demonstrated "the existence of disputed material facts supporting standing." The court also found the existence of disputed material facts concerning whether the litigation was "sufficiently germane to the organization's purpose," and rejected TMD's claims that SDOG's corporate status precluded the lawsuit and that SDOG was the alter ego of the Briggs Law Corporation. The court granted summary adjudication of the second cause of action (leaving just the Proposition 26 claim) concluding the term of the TMD assessment was not, as SDOG asserted, limited to 10 years by San Diego Municipal Code provisions.

Thereafter, the court granted TMD's motion to bifurcate the court trial into a standing phase, followed by a merits phase. The standing phase included witness testimony from SDOG's general members and board members, a City staff member, and testimony from multiple experts. After the conclusion of the witness testimony, and additional briefing and argument by counsel, the court issued a statement of decision finding SDOG had standing to pursue its remaining claim based on Perine's membership in the organization[4] and finding that the lawsuit was germane to the organization's purpose.

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4 Throughout the standing phase of the trial, SDOG continued to assert that its members had standing to bring the lawsuit based on their status as registered voters, regardless of whether they were subject to the assessment, because the challenged ordinances violated the California Constitution because they were "approved by hoteliers and not by the electorate."

Before the merits trial was set to begin on August 22, 2016, the City adopted Resolution No. R-310664, modifying the challenged 2012 resolution by eliminating assessments on lodging businesses with less than 70 rooms. This new resolution reverted to the funding formula that existed before the challenged 2012 resolution was adopted. While the City was considering the adoption of the amendment in July 2016, TMD filed an ex parte application to set a hearing on a motion for judgment on the pleadings before the start of the merits trial. TMD's application argued that because Perine owned a rental business that was no longer subject to the amended TMD assessment, her membership in SDOG no longer supported its standing. SDOG successfully opposed the application, and the trial court issued an order confirming the August merits trial date.

After the City passed the TMD assessment amendment on August 2, 2016, TMD and the City brought another ex parte application again seeking to vacate the merits trial and set a hearing on TMD's motion for judgment on the pleadings. SDOG opposed the application, and indicated that if the court were inclined to consider the motion for judgment on the pleadings asserting that SDOG had lost its standing as a result of the amendments to the assessment, SDOG would seek leave of court to file a supplemental pleading challenging the City's modifications to the assessment. At the hearing on the ex parte application, the court granted TMD and the City's request to file a motion for judgment on the pleadings and ordered the motion briefed simultaneously with the merits trial.

A week later, SDOG filed its own ex parte application seeking to postpone the merits trial for the court to first consider the defendants' pending motion. SDOG then

filed its opposition to the motion conceding "the law is on [the defendants'] side" and that the 2016 amendment to the assessment compelled the court to grant the motion because the amendment "supplanted" the illegality giving rise to the lawsuit. The opposition brief also pleaded with the court not to enter a "validation" judgment under section 860, et seq.[5] and to "retain jurisdiction to entertain a motion for attorney fees and memorandum of costs." The court granted the defendants' motion for judgment on the pleadings and entered judgment in their favor. The court reserved jurisdiction "to determine the prevailing party, the award of costs and the award of attorneys fees, if any, as authorized by law."

Shortly after, SDOG submitted a memorandum of costs. TMD and the City moved to strike the memorandum, asserting SDOG was not entitled to costs because it was not a prevailing party. TMD also submitted a memorandum of costs, which SDOG moved to strike on the ground that it, not TMD, was the prevailing party in the litigation. Several months later, SDOG brought a motion seeking an attorney's fees award of $2.6 million under section 1021.5. SDOG argued its lawsuit was a catalyst for the City's 2016 amendment, which entitled it to the award. Its motion claimed the amendment was

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5 "The validation statutes are found in Code of Civil Procedure sections 860 through 870.5. A public agency may file a validation action to determine the validity of any matter brought within the scope of the validation statutes. (Code Civ. Proc., § 860.) Alternatively, any 'interested person' may bring a validation action to determine the validity of the matter. (*Id*., § 863.) A validation action initiated by an ' "interested person" ' is sometimes referred to as a ' "reverse validation action." ' [Citation.] If an agency does nothing, and no interested person brings suit to determine the validity of the action within 60 days, the action is deemed valid." (*Holloway v. Showcase Realty Agents, Inc.* (2018) 22 Cal.App.5th 758, 763-764.)

"intended to address SDOG's concern that the TMD levy on smaller lodging businesses was being abused by tourism-industry freeloaders." TMD and the City opposed SDOG's motion and SDOG filed a brief in reply. TMD also moved to disqualify Briggs on the ground that SDOG's motion for attorney's fees improperly incorporated a privileged document that had been inadvertently produced to SDOG during discovery.

The trial court held a hearing on both motions to strike, SDOG's motion for attorney's fees, and TMD's motion to disqualify Briggs. During the hearing, the trial court confirmed a tentative order denying the motion to disqualify Briggs and took the remaining motions concerning costs and SDOG's attorney's fees under submission. TMD appealed the denial of its disqualification motion.

Two weeks later, the trial court issued two orders, one addressing SDOG's motion for attorney's fees and the other addressing both pending motions to strike the parties' cost memorandums. The court granted SDOG's motion for attorney's fees on a catalyst theory, but applied a "negative multiplier of .25" and awarded fees of only $827,035 (rather than the $2.6 million sought) in light of "the limited success achieved by [SDOG] compared to the broader objective set forth in the TAC." The court found that although SDOG "did not win the case by prevailing on the issue of standing in the first phase, this part of Plaintiff's success contributed to [the] City's decision to modify" the TMD assessment "before the second phase trial was scheduled to begin." The court concluded that "given the merit of Plaintiff's case, Defendant's risk assessment of [the challenged TMD assessment amendment], and the causal connection between the imminent trial of this lawsuit and the 2016 Amendment, Plaintiff achieved the maximum (i.e., primary)

relief it could have achieved." The court's separate order on the motions to strike concluded neither party was a prevailing party under section 1032. The court granted both SDOG's motion to strike TMD's cost memorandum and TMD and the City's motion to strike SDOG's cost memorandum.

TMD and the City appealed the order awarding SDOG attorney's fees under section 1021.5. TMD also appealed the order addressing the competing motions to strike costs. SDOG filed a cross-appeal from the attorney's fee award but dismissed the appeal in this court.

DISCUSSION

TMD and the City challenge the trial court's award of attorney's fees under section 1021.5 on the grounds that (1) SDOG did not obtain the primary relief sought by its lawsuit, (2) did not make a reasonable settlement offer before its lawsuit was filed, and (3) the suit did not further any important right in the public's interest or confer a significant public benefit. TMD and the City also contend the court's award accepting SDOG's lodestar was an abuse of discretion. In addition, TMD challenges the trial court's orders striking its costs and denying its motion to disqualify Briggs.

I

SDOG Failed to Obtain the Primary Relief Sought

A

Section 1021.5 entitles a successful litigant to an award of attorney's fees "when its lawsuit 'resulted in the enforcement of an important right affecting the public' and, among other things, 'a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons.' Even without a favorable judicial resolution, the plaintiff is considered a 'successful' litigant for purposes of section 1021.5 if the lawsuit was the 'catalyst' that caused 'the defendant [to] change[] its behavior substantially because of, and in the manner sought by, the litigation.' "[6] (*Marine Forests Society v. California Coastal Com.* (2008) 160 Cal.App.4th 867, 869-870 (*Marine Forests*).)

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6 Section 1021.5 states in full, "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

"Attorney's fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in *Serrano v. Priest*, 20 Cal.3d 25, 49."

To obtain a fee award on the basis of the catalyst theory, that is without "a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense, as elaborated in *Graham* [*v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553 (*Graham*)]; and (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit.' " (*Marine Forests*, *supra*, 160 Cal.App.4th at pp. 877-878.)

" 'Whether a party has met the requirements for an award of fees and the reasonable amount of such an award are questions best decided by the trial court in the first instance. [Citations.] That court, utilizing its traditional equitable discretion, must realistically assess the litigation and determine from a practical perspective whether the statutory criteria have been met. [Citation.] Its decision will be reversed only if there has been a prejudicial abuse of discretion. [Citation.] To make such a determination we must review the entire record, paying particular attention to the trial court's stated reasons in denying or awarding fees and whether it applied the proper standards of law in reaching its decision. [Citation.]' [Citations.] 'The pertinent question is whether the grounds given by the court for its denial of an award are consistent with the substantive law of section 1021.5 and, if so, whether their application to the facts of th[e] case is within the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and policy of the statute.' " (*Marine Forests*, *supra*, 160 Cal.App.4th at p. 876.)

B

In its order granting SDOG's attorney's fee motion, the trial court recognized that SDOG "did not win the case by prevailing on the issue of standing" but found that "this part of the [SDOG]'s success contributed to Defendant City's decision to modify [the TMD assessment] shortly before the second phase trial was scheduled to begin." The court then found "Defendant's decision to 'eliminate from the District and assessment those lodging businesses with fewer than 70 rooms' constitutes a substantial change in Defendant's behavior" and "Plaintiff's lawsuit impacted Defendant's decision to 'eliminate from the District and assessment those lodging businesses with fewer than 70 rooms,' which, as discussed herein, constitutes a substantial change in Defendant's behavior."

In response to the City and TMD's argument that the elimination of businesses with 70 or fewer rooms was not the primary relief sought by SDOG, the trial court accepted that "Plaintiff's broader objective, as reflected in the TAC, was to invalidate all of Resolution R-307843 [the 2012 assessment renewal resolution]," but found "the lawsuit's 'catalytic' effect should not, from the Court's perspective, be limited to the four corners of the TAC" and that "Defendant's decision to 'eliminate from the District and Assessment those lodging business with fewer than 70 rooms' relieved a majority of the 'lodging businesses' from continuing to be assessed . . . which encompassed, significantly, Linda Perine, the focus of so much contention at the phase one trial."

The trial court noted that evidence before it showed a connection between the lawsuit and 2016 amendment, pointing to a statement by TMD's executive director that "the 'ultimate objectives' of eliminating lodging businesses with less than 70 rooms

included making the TMD 'impervious to criticism and worse, lawsuits' " as evidence that "the TMD believed that the modification would make the law more compliant with the mandate of Proposition 26." The court concluded by finding that "given the merit of Plaintiff's case, Defendant's risk assessment of Resolution R-307843's validity, and the causal connection between the imminent trial of this lawsuit and the 2016 Amendment, Plaintiff achieved the maximum (i.e., primary) relief it could have achieved."

C

TMD and the City contend that the court erred in awarding SDOG attorney's fees under the catalyst theory because it did not obtain the primary relief sought by its litigation. Specifically, TMD asserts that in awarding fees, the trial court incorrectly "equated maximum relief possible at the time" of trial with the primary relief sought by SDOG. The City echoes this argument and notes that neither the operative complaint nor any of SDOG's statements throughout the years-long litigation supports SDOG's position that modification of the resolution to exclude small lodging businesses was a primary goal of its claims.

We agree with the appellants that the trial court's conclusion that SDOG obtained the primary relief sought in the litigation is inconsistent " 'with the substantive law of section 1021.5' " and outside " 'the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and policy of the statute.' " (*Marine Forests*, *supra*, 160 Cal.App.4th at p. 876.) Throughout the case, SDOG consistently stated that invalidation of the assessment was required by Proposition 26 because (1) the benefits of the TMD assessment (namely increased tourism marketing) inured to

businesses other than hotels at the expense of the hotels, and (2) unequally *benefited* smaller hotels at the expense of the larger hotels. SDOG points to nothing in the record before judgment was entered against it that indicates it was advocating for the change made by the City in 2016.[7]

Indeed, in opposing summary judgment on the basis that all registered voters in the City had standing to challenge the assessment under Proposition 26, SDOG stated explicitly that the "gravamen of [the] lawsuit, . . . first and foremost," was voting rights. The operative complaint asserted the rights of all registered voters in the City—not those of lodging business operators, small or large—were violated by the passage of the 2012 TMD assessment because small lodging businesses were unlawfully *benefiting* from the greater contribution required from larger lodging businesses to the TMD fund. The record before this court makes clear that the only relief sought by the case was the invalidation of the assessment as an unlawful tax under Proposition 26. The amendment that occurred in 2016 did not afford this relief.

SDOG makes three types of arguments to avoid the conclusion that it did not obtain the primary relief it sought. First, SDOG attempts to blur the applicable standard to turn the focus away from the primary relief requirement under the catalyst theory. SDOG argues the trial court must take a "broad, pragmatic" view of what constitutes a successful party under section 1021.5, which it asserts encompasses the outcome here.

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[7] The declaration by SDOG board member Pedro Quiroz, Jr., filed in support of SDOG's fee motion that SDOG cites to support its argument that the 2016 change was an objective of its lawsuit was filed well after judgment was entered against it.

Second, SDOG creates a strawman, inaccurately stating that TMD and the City argue that SDOG was litigating on behalf of "large hoteliers," and not the smaller lodging business excluded under the 2016 amendment. Third, SDOG argues the evidence establishing a causal connection between the litigation and the 2016 amendment sufficiently supports the fee award. While a necessary element of awarding attorney's fees on the catalyst theory, a causal connection alone does not satisfy the standard.

SDOG argues *Graham* requires courts to take a "broad, pragmatic view of what constitutes a 'successful party.' " (*Graham*, *supra*, 34 Cal.4th at p. 565.) This is true, but only so far as this directive allows courts to assess whether a litigant who does not obtain a "judicially sanctioned change in the legal relationship of the parties" has otherwise accomplished what the lawsuit set out to do. (*Id*. at p. 570.) *Graham* reaffirmed the application of the catalyst theory under section 1021.5 and clarified the requirements of the theory. (*Id*. at pp. 567-571.) *Graham* noted the policy reason behind section 1021.5—"to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases"—extends to cases where the defendant voluntarily changes its behavior in the manner sought by a private attorney general. (*Graham*, at p. 565; see *id*. at p. 568 [The catalyst theory "is fully consistent with the purpose of section 1021.5: to financially reward attorneys who successfully prosecute cases in the public interest, and thereby ' "prevent worthy claimants from being silenced or stifled because of a lack of legal resources." ' "].) This policy however, does not extend to the situation here, where the changed behavior, though related to the litigation, is not the relief sought by the case. (See *Marine Forests, supra*, 160 Cal.App.4th at pp.

878-879; and *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 192 (*California Public Records Research*).)

SDOG argues that the City and TMD's appellate briefs assert SDOG was suing only for large hoteliers to prevent the City from benefiting small hotels and SDOG's "claim of success, supposedly on behalf of small hoteliers, is 'revisionist history.' " This is an inaccurate recasting of the appellants' arguments. Appellants argue only that, as SDOG itself concedes in its brief, SDOG's "lawsuit was always primarily intended to prevent the City . . . from passing resolutions that purport to be constitutionally-innocuous 'self assessments,' but that, according to voter-approved Proposition 26, in fact qualify as 'taxes' that require voter approval." Contrary to SDOG's assertions, however, the City's modification of the TMD assessment in 2016 did not cure this alleged wrong and, thus, also did not provide the primary relief SDOG sought.

SDOG's third defense of its fee award with respect to the primary relief element of the catalyst theory is that the causal connection between the litigation and the 2016 amendment shows it obtained the primary relief sought. The record does show that a reason TMD advanced the 2016 amendment to the assessment was the elimination of this lawsuit.[8] TMD and the City thought the 2016 modification would moot the litigation in two ways. First, by eliminating SDOG's standing, which the trial court had based exclusively on Perine's participation in the case as the operator of a small lodging business and, second, by limiting the assessment to the businesses it thought were the

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8 Another factor was the elimination of administrative hassles of obtaining the vote of and collecting assessments from smaller lodging businesses like Airbnbs.

primary beneficiaries of the assessment, large hoteliers. This second basis is encompassed by the overarching goal of SDOG's suit. As discussed, however, the record is clear that the only relief SDOG sought throughout the litigation was the elimination of the TMD altogether. SDOG can point to no evidence to show it sought this modification, which it now disingenuously concedes is "a proper self-assessment" that does not require voter approval because all of the proceeds are spent to benefit large hotels. Throughout the case, SDOG argued it was the voters' rights under Proposition 26 that were violated by the assessment, not the rights of small lodging businesses. In fact, as discussed, its position was that the assessment was a tax precisely because small hoteliers were *benefiting* from the greater contributions of their larger industry counterparts.

Marine Forests is a helpful analog. There, the Court of Appeal reversed an attorney's fee award based on the catalyst theory where the Legislature amended the laws governing appointments to the California Coastal Commission as a result of the plaintiff's lawsuit, but where the primary goal of the litigation was to save an artificial marine reef the plaintiff had constructed off the coast near Newport Harbor. (*Marine Forests*, *supra*, 160 Cal.App.4th at p. 870.) Although the litigation was the cause of the legislation that changed the composition of the Coastal Commission, it was not the primary relief sought by the litigation and the plaintiff was still subject to a valid Coastal Commission order to remove the reef. The Third District overturned the trial court's finding that fees under the catalyst theory were appropriate because " 'a significant goal of the litigation was to ensure that the composition of the Coastal Commission complied with the separation of powers doctrine.' " (*Id*. at p. 878)

The appellate court held that, even though the litigation resulted in a change, it did not achieve the primary relief sought and therefore the trial court erred in awarding attorney's fees under section 1021.5. (*Marine Forests*, *supra*, 160 Cal.App.4th at p. 878.) The court noted that "[i]n cases where judicial relief was obtained, it is sufficient if the plaintiff achieved partial success or succeeded on *any* significant issue in the litigation which achieved *some* of the benefit the plaintiff sought in bringing suit. [Citation.] However, in catalyst cases, the defendant must have provided the plaintiff with the *primary* relief sought." (*Ibid*.; see also *California Public Records Research*, *supra*, 4 Cal.App.5th at p. 192 [affirming denial of attorney's fees under catalyst theory where plaintiff's lawsuit did result in a reduction of copying expenses charged by the county, but the primary goal of the litigation set out in the petition and complaint "was to change the way in which the [c]ounty calculates copy fees by limiting recoverable indirect costs."].)

Like the relief obtained in *Marine Forests*, SDOG's lawsuit was a catalyst for a change in the TMD assessment. Specifically, the City modified the assessment to eliminate Perine's and SDOG's standing, an outcome SDOG conceded was legally correct in its nonopposition to TMD's motion for judgment on the pleadings after the standing phase of the trial was complete. The change SDOG obtained, however, did not achieve its objective to afford voters the opportunity to vote on the alleged tax.[9]

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9 Because we conclude that that 2016 amendment to the TMD assessment was not the primary relief sought and thus did not provide a basis for SDOG to obtain attorney's fees under the catalyst theory, we do not reach appellants' additional arguments concerning whether SDOG's attempt to settle was sufficient, or whether the lawsuit furthered an important public right and conferred a significant public benefit.

II

Denial of TMD's Costs Constituted an Abuse of Discretion

TMD next contends the trial court erred by granting SDOG's motion to strike its cost memorandum. TMD argues it was the prevailing party under the statutory definition contained in section 1032 and the court, therefore, lacked discretion to deny its costs. SDOG responds that it should escape its cost obligation because TMD and the City conceded the 2012 assessment resolution "was constitutionally infirm in exactly the ways SDOG had always asserted." SDOG claims, without citation to legal authority, "it would make no public policy sense if, as TMD advocates, public entities could pass resolutions with impunity, knowing that, if challenged, they could simply amend the resolution, move for judgment on the pleading[s], and claim to be the 'prevailing party' for purposes of a cost award."

A

" 'The right to recover any of the costs of a civil action "is determined entirely by statute." ' " [Citation.] " ' "[I]n the absence of an authorizing statute, no costs can be recovered by either party." ' " (*Davis v. KGO-T.V.* (1998) 17 Cal.4th 436, 439, disapproved on another ground in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97.) " 'Section 1032 governs the award of costs of trial court litigation.' " [Citation.] Under section 1032, subdivision (b), a 'prevailing party' is entitled to recover

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Our decision reversing the trial court's award of attorney's fees also moots TMD's assertion that the trial court's acceptance of SDOG's lodestar calculation was error.

costs 'as a matter of right' unless otherwise provided by statute." (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 737 (*Charton*).)

Section 1032, subdivision (a)(4) defines a prevailing party entitled to costs. "The first sentence of that subdivision 'describes four categories of litigants who automatically qualify as prevailing parties.' " (*Charton, supra*, 247 Cal.App.4th at p. 737.) The law states " 'Prevailing party' includes [1] the party with a net monetary recovery, [2] a defendant in whose favor a dismissal is entered, [3] a defendant where neither plaintiff nor defendant obtains any relief, and [4] a defendant as against those plaintiffs who do not recover any relief against that defendant."[10] (§ 1032, subd. (a)(4).) " '[T]he trial court has no discretion to deny prevailing party status to a litigant who falls within one of the four statutory categories in the first [sentence] of the provision.' " (*Charton*, at p. 737.) Section 1032 "declares that costs are available as 'a matter of right' when the prevailing party is within one of the four categories designated by statute." (*Ibid*.)

A successful defendant falls squarely into section 1032's definition of a prevailing party and absent statutory authority to the contrary, the court has no discretion to deny that defendant's costs. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 129.) Further,

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10 Subdivision (a)(4) of the statute also provides "[i]f any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides . . . ." (§ 1032.) "This prong of the statute thus calls for the trial court to exercise its discretion both in determining the prevailing party and in allowing, denying, or apportioning costs. It operates as an express statutory exception to the general rule that a prevailing party is entitled to costs as a matter of right.' " (*Charton, supra*, 247 Cal.App.4th at p. 738.)

"[t]here is no exception in the cost statute for dismissals of []complaints obtained on the ground that the []complaint has become moot." (*City of Long Beach v. Stevedoring Services of America* (2007) 157 Cal.App.4th 672, 680.) "Whether a party falls within one of the four categories authorizing the recovery of costs as a matter of right is a question of law we review de novo." (*Charton, supra*, 247 Cal.App.4th at p. 739.)

B

In this case, as a defendant in whose favor dismissal was ordered, TMD is a statutorily defined prevailing party. (§ 1032, subd. (a).) As such, it is entitled to allowable costs as a matter of right. (*Id.*, subd. (b).) The trial court concluded it would be inequitable to award TMD its costs because "[t]he action of amending the assessment district rendered this action moot through no fault of plaintiffs." The court, however, lacked discretion under section 1032 to make this determination. (See *Huerta v. Kava Holdings, Inc.* (2018) 29 Cal.App.5th 74, 79 [(By statute, a defendant against whom a plaintiff recovers no relief is a "prevailing party" and "[a] trial court has no discretion to deny prevailing party status to such a defendant."].)

SDOG's argument that TMD should be excepted from its statutory right to costs because its "11th-hour" amendment to the TMD assessment was a "complete capitulation" is not well-taken. As discussed in detail *ante*, the amendment was not a "complete capitulation" to SDOG's lawsuit and did not ameliorate the primary concern raised by SDOG's complaint. Rather, the record indicates the change was made to remove SDOG's standing, to simplify the process of assessing lodging businesses, and to address Proposition 26 (though not in the way advocated by SDOG). SDOG provides no

legal authority to support its argument that public policy favors ignoring the clear statutory authority governing this determination.[11] (See *Nelson v. Anderson, supra*, 72 Cal.App.4th at p. 129 [Absent statutory authority, "the court has no discretion to deny costs to the prevailing party."].) In fact, SDOG's argument is entirely untethered from the statutory law that governs this issue. Accordingly, the court's order striking TMD's costs is reversed.

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11 The trial court cited *Lewin v. Board of Trustees* (1976) 62 Cal.App.3d 977 (*Lewin*) to support its decision to strike TMD's costs. *Lewin* involved a proceeding in administrative mandate to overturn the decision of the Trustees of the Pasadena Unified School District with respect to its hiring and firing practices and a challenge to the trial court's award of costs to the petitioners, who were only partially successful in their challenge of the trustees' decision. (*Id.* at p. 983-984.) The Court of Appeal upheld the trial court's determination under sections 1094.5 and 1095 that the petitioners were a prevailing party under those statutes entitled to costs. *Lewin* has no bearing on the determination in this case whether TMD is a prevailing party under section 1032.

III

Denial of TMD's Motion to Disqualify

TMD's last contention on appeal is that the trial court abused its discretion by denying TMD's motion to disqualify Briggs based on SDOG's use of a privileged e-mail, which TMD asserts it inadvertently produced, in support of its motion for attorney's fees. TMD argues this error provides an alternative basis to reverse the trial court's award of fees to SDOG. Because we agree with TMD that the trial court erred by concluding SDOG obtained the primary relief it sought through this litigation, we need not reach this alternative argument. Further, any error is not prejudicial in light of this opinion.

We do note that the basis for the trial court's denial of the motion to disqualify does not appear to be supported by the record. Specifically, the trial court denied the motion based on its finding that although the evidence showed that the privileged e-mail was inadvertently produced, the evidence also showed that TMD had waived the privilege by publishing the e-mail on its website. The record, however, does not contain any evidence to support this fact. Rather, TMD maintained that the documents it produced via its website in response to SDOG's Public Record Act request were TMD board documents, e.g. meeting agendas, minutes and TMD's bylaws. Briggs submitted no evidence to dispute this assertion or supporting his assertion that he obtained the email from TMD's website.

DISPOSITION

The orders awarding attorney's fees to SDOG and striking TMD's costs are reversed. The trial court is directed to enter an order denying SDOG's motion for attorney's fees and to enter an order denying SDOG's motion to strike TMD's cost memorandum. Appellants are awarded costs of appeal.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.